Cepat Wawasan Group Bhd & Ors v Foo Kon Chen

HIGH COURT (SANDAKAN) — CIVIL APPEAL NO S11–05 OF 2011
LEE HENG CHEONG JC
26 APRIL 2012

Civil Procedure — Judicial precedent — Binding force — Whether lower court was bound by judgments obtained by other recipients of gratuity, whose claims were made in High Court

Contract — Agreement — Agreement to pay gratuity — Whether there was contractual obligation to pay gratuity — Whether appellants' entitled to withdraw payment of gratuity — Contracts Act 1950 s 26

The appellants had initially agreed to pay the respondent employee a three month gratuity payment. However, the cheque for payment of the gratuity was dishonoured by the bank as there was a change in the signatories to the cheque. The appellants then changed their minds and decided to withdraw the payment of the gratuity to the respondent. The respondent filed an action against the appellants for, inter alia, the sum of RM14,459.85, being three months gratuity payment, with interest from the date of dishonour of the cheque until full payment. The court allowed the respondent's claim. This was the appellants' appeal to the High Court against the lower court's decision. It was the respondent's case that the appellants were not entitled to withdraw the payment of the gratuity. In the course of the trial in the lower court, the respondent had contended that judgments obtained by other recipients of the gratuity, whose claims were made in the High Court, were binding on the lower court which heard the appellants' case.

Held, allowing the appellant's appeal with costs:

(1) In the circumstances of this case, there was no contractual obligation on the part of the appellants to pay the gratuity, which was in fact an incomplete and imperfect gift. As such, the appellants were entitled to withdraw the gratuity at any time before it was completed (see para 5).

(2) The agreement to pay the respondent a gratuity, being a gift, was not caught by s 26 of the Contracts Act 1950 (see para 9).

(3) The appellants and the respondent were not parties to the other cases relied upon by the respondent as binding on the lower court. There was also no evidence before this court as to whether the issues in those other

cases were the same as the issues in the present case. As such, the High Court judgments obtained by other recipients of the gratuity were not binding on the lower court which heard the appellants' case (see para 12).

[Bahasa Malaysia summary

Perayu-perayu pada mulanya bersetuju untuk membayar responden pekerja bayaran ganjaran tiga bulan. Walau bagaimanapun cek untuk bayaran ganjaran dianggap tidak sah laku oleh bank memandangkan terdapat perubahan dalam penandatangan-penandatangan kepada cek tersebut. Perayu-perayu kemudiannya menukar fikiran dan memutuskan untuk menarik balik bayaran ganjaran kepada responden. Responden memfailkan tindakan terhadap perayu-perayu untuk, antara lain, jumlah RM14,459.85, sebagai bayaran ganjaran tiga bulan, dengan faedah dari tarikh cek tidak sah laku sehingga bayaran penuh. Mahkamah membenarkan tuntutan responden. Ini adalah rayuan perayu-perayu kepada Mahkamah Tinggi terhadap keputusan mahkamah bawahan. Adalah kes responden bahawa perayu-perayu tidak berhak untuk menarik balik bayaran ganjaran tersebut. Semasa perbicaraan di mahkamah bawahan, responden telah berhujah bahawa penghakiman yang diperolehi oleh penerima-penerima ganjaran yang lain, yang membuat di tuntutan Mahkamah Tinggi, adalah mengikat mahkamah bawahan yang mendengar kes perayu-perayu.

Diputuskan, membenarkan rayuan perayu-perayu dengan kos:

(1) Dalam keadaan kes ini, tidak terdapat tanggungjawab kontrak oleh pihak perayu-perayu untuk membayar ganjaran tersebut, yang mana sebenarnya adalah hadiah yang belum siap dan tidak sempurna. Dengan itu, perayu-perayu berhak menarik balik ganjaran tersebut pada bila-bila masa sebelum ia siap (lihat perenggan 5).

(2) Perjanjian untuk membayar responden dengan ganjaran, sebagai hadiah, tidak melibatkan s 26 Akta Kontrak 1950 (lihat perenggan 9).

(3) Perayu-perayu dan responden bukan pihak kepada kes-kes yang lain yang diguna oleh responden sebagai mengikat mahkamah bawahan. Juga tidak terdapat keterangan di hadapan mahkamah ini sama ada isu-isu dalam kes-kes tersebut adalah sama seperti isu-isu di dalam kes ini. Dengan itu, penghakiman Mahkamah Tinggi yang diperolehi oleh penerima-penerima lain terhadap ganjaran tidak mengikat mahkamah bawahan yang mendengar kes perayu-perayu (lihat perenggan 12).]

Cases referred to

Bullock v The London General Omnibus Co [1907] 1 KB 264, CA (refd)
Director-General of Inland Revenue v Highlands Malaya Plantations Ltd [1988] 2 MLJ 99, SC (refd)
Eddystone Marine Insurance Co, Re (1894) WN 30, Ch D (refd)

A *Great Western Co Ltd v Minister of National Revenue* (1947) Ex CR 458 (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49, PC (refd)
Leong Cheong Kweng Mines Ltd v Kok Hoong [1962] MLJ 224, CA (refd)
Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd [2010] 1 MLJ 822; [2010] 3 CLJ 818, CA (folld)
B *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v Zakaria bin Husin* [1985] 2 MLJ 287; [1985] 1 LNS 38, SC (refd)
UMW Toyota (M) Sdn Bhd v Chow Weng Thiem [1996] 5 MLJ 678; [1996] 1 LNS 92, HC (folld)
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Legislation referred to

Bills of Exchange Act 1949
Bills of Exchange Ordinance
Contracts Act 1950 s 26
D Income Tax Act 1967
Moneylenders Ordinance 1951

Zaleha Mohd Yusuf Pan (Francis Wong with her) (Peter Lo & Co) for the appellants.
E *Edwin Tsen (Tan Pang Tsen & Co) for the respondent.*

Lee Heng Cheong JC:

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[1] This appeal is against the lower court's decision in allowing the respondent's claim for the sum of RM14,459.85, being three months gratuity payment and the sum of RM47.83, being reimbursement of allowances incurred and interest at the rate of 14%pa under the Bill of Exchange Act 1949
G from the date of dishonor of the cheques until full payment.

ISSUES ARISING

[2] I find that the following are the issues which are pertinent in disposing off
H this appeal. They are as follows:

(a) whether the appellants were entitled to withdraw the payment of the gratuity to the respondent?

I (b) whether s 26 of the Contracts Act 1950 is applicable to the facts of this appeal? and

(c) whether the principle of judicial precedent is applicable in that the lower court was bound by the High Court granting judgment to the plaintiff in Summons Nos 52–203 of 2005, 72–322 of 2006 and 72–323 of 2006?

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CONSIDERATION OF THE ISSUES

Whether the appellants were entitled to withdraw the payment of the gratuity to the respondent?

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[3] From the facts, I noted that the appellants initially agreed to pay a gratuity to the respondent but the cheque for payment of the said gratuity was dishonoured by the bank as there was a change in the signatories to the cheque. The appellants then decided not to give the gratuity to the respondent, by giving the respondent, a fresh cheque.

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[4] I find that that the appellants are entitled to withdraw the payment of the gratuity to the respondent for the following reasons.

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[5] In the circumstances of this case, I find that there was no contractual obligation on the part of the appellants to pay the gratuity which is a gift and in fact incomplete gift. As such, the appellants are entitled to withdraw the gratuity at any time before it is completed.

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[6] I am guided by the case of *Ngan & Ngan Holdings Sdn Bhd & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 287; [2010] 3 CLJ 818 where Ramly Ali JCA in delivering the judgment of the Court of Appeal said:

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> [38] *Where a gift rests merely in promise, whether written or oral, or in an unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor or those claiming under it, to complete or perfect it If a gift is to be valid, the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do* (see: *Halsbury's Laws of England*, (4th Ed), reissue, Vol 20 p 42, para 63; and *Omega Securities Sdn Bhd v Yeo Lee Hoe* [2002] MLJU 571; [2003] 1 CLJ 276).
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> [39] *An incomplete gift can be revoked at any time; there is a power to draw back so long as the gift is incomplete,* (see: *Standing v Bowring* (1885) 31 Ch D 282 at p 290(A). In *re Fry* [1946] Ch 312; [1946] 2 All ER 106 it was held that the intended gift was incomplete and therefore inoperative in that the donor had not done anything required of him in order to divest himself of the legal right and equitable title of the shares in question. That decision was followed by the Singapore Court of Appeal in *re Lee Phee Soo, Decd* [1960] MLJ 234; [1960] 1 LNS 108 (CA).
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> [40] Applying the above principles to the facts of the present case, it is clear, that the proposed 'gratuity' to be given to the second defendant (in the form of the said property) is an incomplete and imperfect gift. The court will not compel the plaintiff or the intending donor (WTK) to complete

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> and perfect it. The second defendant, as the donee of the proposed gift has no right over the property (the subject matter of the gift), and thus cannot claim any interest on it. (Emphasis added.)

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[7] I am further persuaded by the case of *UMW Toyota (M) Sdn Bhd v Chow Weng Thiem* [1996] 5 MLJ 678; [1996] 1 LNS 92 where Abdul Malik Ishak J (as he then was) held:

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> After all, it was said in *Malayan Agricultural Producers Association v All Malayan Estates Staff Union* [1982] ILR 127 especially at p 138:
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> Bonus, according to *Oxford Dictionary*, is 'gratuity to employees beyond their wages'. It is an incentive given to an employee. And so long as bonus is a gratuitous payment and its quantum relates to profits and productivity, it will not be right in a concept for us to depart from past industrial court rulings and to make bonus payment a contractual one. We will therefore make an order that bonus shall be paid at the discretion of the employers.

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In *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99, Lee Hun Hoe CJ (Borneo) (as he then was) said at p 104:

> It is difficult to lay down any general rule as to what bonus is, *1 Jowitt's Dictionary on English Law* (2nd Ed), at p 238 defines 'bonus' to mean premium or advantage; an occasional extra dividend; a gratuity. The Income Tax Act 1967 does not define the word 'bonus'. Both the learned judges and special commissioners accepted 'bonus' to mean 'a boon or gift over and above what is normally due as remuneration to the receiver'. They were merely following what Stirling J did in *Re Eddystone Marine Insurance Co* (1894) WN 30 when he said:

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> I adopt the definition of 'bonus' given in the *New English Dictionary* viz a boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good.

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Lee Hun Hoe CJ (Borneo) (as he then was) continued at p 105 of the same judgment by citing a Canadian case. This was what His Lordship said:

> As O'Connor J said in the Canadian case of *Great Western Co Ltd v Minister of National Revenue* (1947) Ex CR 458 at p 467:

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> *A bonus may be a mere gift or gratuity as a gesture of goodwill, and not enforceable, or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. But in both cases it is something in addition to or in excess of that which is ordinarily received.* (Emphasis added.)

Whether s 26 Contracts Act 1950 is applicable to the facts of this appeal

[8] Section 26 of the Contracts Act 1950 states as follows:

> An agreement made without consideration is void, unless:—
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> (a) It is in writing and registered;
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> It is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents and is made on account of natural love and affection between parties standing in a near relation to each other;
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> (b) or is a promise to compensate for something done;
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> It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or
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> (c) or a promise to pay a debt barred by limitation.
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> It is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
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> In any of these cases, such an agreement is a contract.

[9] Applying the said s 26 of the Contracts Act 1950 to the facts of this case, I hold that the said gratuity, being a gift is not caught by s 26 of the Contracts Act 1950.

Whether the principle of judicial precedent is applicable in that the lower court was bound by the High Court granting judgment to the plaintiff in Summons Nos 52–203 of 2005, 72–322 of 2006 and 72–323 of 2006

[10] In the course of the trial in the lower court, the respondent contended that judgments obtained by other recipients of the gratuity in which claims were made in High Court, is binding on the lower court which heard the appellants' case and the respondent further contended that the appellant were estopped from challenging the respondent's claim by virtue of the other judgments related to the payment of the said gratuity.

[11] The Federal Court case of *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v Zakaria bin Husin* [1985] 2 MLJ 287; [1985] 1 LNS 38 provided some guidance where Syed Agil Barakbah SCJ held:

A It was submitted that the respondent having obtained default judgment against the third defendant as his employer under O 13 r 2 of the Rules of High Court 1980 was estopped from proceeding against the appellant and the other defendant on the ground that the default judgment is final on the issue of liability for negligence.

Order 13 r 2 states:

B Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

C The effect of this rule is that such a judgment is interlocutory only as to the amount and is final as to the right of the plaintiff to recover damages together with such costs, to which he would be entitled when the amount is ascertained (see *White Book* 1982, p 141 para 13/2/1). *According to the law in England,* D *which is the law applicable to this case, a default judgment is capable of giving rise to an estoppel per rem judicatam, but it must be subjected to a more restricted operation. It must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided. Estoppel arises only where the determination has been decided necessarily and with complete* E *precision* (see *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49, at p 52).

In that case, there were two separate actions by the appellant who having obtained judgment by default against the respondent for arrears of certain rentals filed a subsequent action for monies alleged to be due to him.

F He objected to a defence of set-off off defences based on certain provisions of the Moneylenders Ordinance 1951 and the Bill of Exchange Ordinance put in by the respondent on the ground that the latter was estopped from raising them by virtue of a previous judgment given at an earlier action between the same G parties. In the High Court, the validity of this objection was raised, argued and decided as a preliminary point. It was upheld by the High Court but reversed by the Court of Appeal who decided there was no estoppel. (*Leong Cheong Kweng Mines Ltd v Kok Hoong* [1962] MLJ 224). On appeal, the Privy Council upheld the decision of the Court of Appeal. Although in the appeal before us, H the objection raised referred to only one and the same action in which default judgment was obtained against one of the defendants, the principles applicable, in our view, are the same as in the case cited above. Be that as it may, the first point which we want to emphasise is that such objection was never raised as a preliminary point in the court below. In normal circumstances, I estoppel must be expressly pleaded except in cases where it arises after the close of the pleading as in present case. The objection should have therefore been raised at the earliest possible opportunity, ie as a preliminary issue before the trial. That was not done.

Having gone to that extent, we are of the opinion that it was too late for the

appellant's counsel to raise the issue of estoppel in the appellate stage based on the default judgment obtained by the respondent against the third defendant in the court below (see *Bullock v The London General Omnibus Co* [1907] 1 KB 264. As said by Viscount Radcliffe in *Kok Hoong*"s case at p 52:

> *There is obvious and indeed grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.* (Emphasis added.)

[12] I find that the appellants and the respondent are not parties to the cases mentioned or relied upon by the respondent and there is no evidence before this court whether the issues in the other cases are the same issues in the present case. Thus I hold that judgments obtained by other recipients of the gratuity in which claims were made in High Court, is not binding on the lower court which heard the appellants' case and that the appellants are not from challenging the respondent's claim by virtue of the other judgments related to the payment of the said gratuity.

ORDER

[13] In the light of the aforesaid, I therefore allow the appellants' appeal with costs to the appellants, to be taxed unless agreed.

Appellant's appeal allowed with costs.

Reported by Kohila Nesan